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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALI BOURESLAN and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

—v.—

ARABIAN AMERICAN OIL COMPANY and
ARAMCO SERVICES COMPANY,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE SOCIETY FOR HUMAN RESOURCES MANAGEMENT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE**

The Society for Human Resources Management ("SHRM"), formerly known as the American Society for Personnel Administration ("ASPA"), is the world's largest association of personnel and human resource professionals, representing over 46,000 members in business, government and education both in the United States and abroad dedicated to the furtherance of personnel and human resource management. Organizations represented by SHRM members collectively employ more than 53 million workers. SHRM and its members have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment, including employment discrimination.

SHRM or ASPA have been specifically invited or participated as *amicus curiae* in cases before this Court involving Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (1982) ("Title VII"), including *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); and *County of Washington, Oregon v. Gunther*, 452 U.S. 161 (1981), as well as in numerous cases in the various Circuit Courts of Appeal.

SHRM's affiliate, International HR ("Int'l HR"), includes international human resource practitioners from hundreds of multinational companies and promotes the personal and professional development of those directly involved in international personnel management. Also, SHRM is one of the co-founders of the World Federation of Personnel Management Associations ("WFPMA"), an umbrella organization formed for the purpose of bringing communication and knowledge-sharing to the personnel profession throughout the world. The WFPMA represents 60 national personnel associ-

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* This *amicus* brief is filed pursuant to Supreme Court Rule 37.3, with the written consent of all parties. Letters of consent have been filed with the Clerk of this Court.

ations with approximately 200,000 members worldwide. As the major associations of the human resources profession, SHRM and its affiliates, Int'l HR and WFPMA, are vitally concerned with the law regarding Title VII and its proper role in the international workplace.

The extraterritorial application of Title VII would adversely impact SHRM members and the global business community. The extension of Title VII abroad would create significant problems for multinational employers in attempting to comply with the inconsistent laws of the host country and the United States. Hence, SHRM submits this Brief supporting the Respondents and urges this Court to affirm the decision below of the Fifth Circuit *en banc*, 892 F.2d 1271, which held that Title VII does not apply extraterritorially, based upon, *inter alia*, the Act's language and its legislative history. Moreover, such interpretation is consistent with important practical and policy considerations.

SUMMARY OF ARGUMENT

Petitioners' expansive reading of Title VII to encompass all American citizens in whatever country they may be employed blithely disregards the considerable burden such an interpretation places on the enforcement mechanisms of the statute and the problems it creates for personnel and human resource professionals of foreign and American corporations based abroad. Companies operating in the international marketplace must be sensitive to local laws and customs. Congress has not extended the jurisdiction of most United States protective labor legislation abroad precisely for this reason.

Petitioners' reliance on the deference they claim should be accorded to the EEOC, the agency charged with the enforcement of Title VII, is misplaced in this case. Courts have never blindly adhered to the interpretation of a statute by an agency and have only deferred to such interpretation to the extent it is consistent with statutory language and its accompanying legislative history. Moreover, judicial deference is

inappropriate especially where, as here, an agency attempts to redefine and expand its own jurisdictional boundaries after adhering to a different, more constricted view. This Court should not hesitate to reject the EEOC's erroneous statutory construction which seeks to expand the territorial limits of Title VII far beyond what Congress authorized.

Based upon Congressional action subsequent to the enactment of Title VII, when Congress seeks to apply laws extraterritorially, it does so in specific detail and with narrow proscriptions. For example, the Export Administration Act of 1979 and the Comprehensive Anti-Apartheid Act of 1986 prohibit the exact same types of discrimination as Title VII but, unlike Title VII, they expressly apply to foreign concerns and establishments. If Congress intended Title VII to apply abroad, the above statutes would be completely duplicative of Title VII. Moreover, Congress had to specifically amend the Age Discrimination in Employment Act to apply abroad because the Fair Labor Standards Act, the statute upon which its jurisdiction is based, only applies domestically like all other protective employment legislation including labor relations, occupational safety and health, equal pay, and so forth.

Petitioners give the misimpression that Title VII has extensive application when in fact the opposite is more correct. Title VII does not cover many employees in the United States since it only effects employers with fifteen or more employees which excludes approximately 15% of the domestic workforce. Moreover, religious organizations, independent contractors, volunteer workers, etc. are also exempted within the United States. Expanding the reach of Title VII beyond the territorial borders of the United States, as the EEOC and Boureslan urge, should not be allowed, especially since Title VII was not even intended to reach many employees working within American jurisdictional boundaries.

Petitioners seek to impose United States laws, and the concomitant American beliefs and values which underlie those laws, on other nations which may have differing employee

protection laws, beliefs and values. The U.S. military's instructions to all troops presently stationed in Saudi Arabia not to openly practice or display their religious beliefs and to female troops to conform their behavior to the limitations placed on women by Saudi society, evidences the need to defer to local laws, beliefs and values to avoid actual conflicts. It is for these very reasons that this Court has fashioned a presumption against extraterritorial application of U.S. employment laws and has required a clear expression of Congressional intent to overcome that presumption. Because neither the specific language of the statute nor the legislative history of Title VII expresses such an intent, or even indicates any purpose or need to regulate foreign employment, Title VII should not be applied extraterritorially.

Indeed, absent a treaty, foreign corporations doing business in the United States must comply with our protective laws. Conversely, American corporations or their foreign subsidiaries located abroad must comply with the labor laws of the host foreign country. Many of the laws and customs of foreign countries, to which companies operating overseas must adhere, materially conflict with the mandates of Title VII or create different responsibilities for employers regarding employment rights and obligations. Hence, extraterritorial application would create practical international employee relations problems.

ARGUMENT

POINT I

EXCEPT FOR THE ADEA, CONGRESS HAS NEVER SUBJECTED EMPLOYMENT PRACTICES ABROAD TO U.S. PROTECTIVE LABOR LEGISLATION

A. Title VII, Like Most Employment Laws, Only Applies Within American Territorial Boundaries.

The claim that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is unlike other employment legislation ignores the express language of the statute which deals with hiring, discharging, and compensating employees as well as all other terms of employment. 42 U.S.C. § 2000e-2(a)(1). Title VII is an employment statute prohibiting discrimination against persons within protected classes in all areas of workplace activities including job assignments, work schedules, promotions, benefits, compensation, corrective action and so forth.[1] The protection of employee rights through laws respecting self-organization, concerted protected activity, wages and hours and occupational safety and health[2] are no less significant than fair employment practices. Congress did not expressly differentiate Title VII from any other protective labor legislation and, indeed, premised Title VII on the same jurisdictional bases as laws pertaining solely to labor relations. *See* 42 U.S.C. § 2000e(h).

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1 In fact, the EEOC regulates the entire work atmosphere through its guidance on a hostile work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); 29 C.F.R. § 1604.11(b) (1986).

2 *See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) (National Labor Relations Act); *Foley Bros. v. Filardo*, 336 U.S. 281 (1949) (Eight Hour Law); *Air Line Dispatchers Ass'n v. National Mediation Board*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951) (Railway Labor Act); *Donovan v. Texaco, Inc.*, 535 F. Supp. 641 (E.D. Tex. 1982), *aff'd*, 720 F.2d 825 (5th Cir. 1983) (Occupational Safety and Health Act).

Petitioners and their *amici* state that Title VII is different from other protective labor legislation because it deals with discrimination. However, the Equal Pay Act, 29 U.S.C. §§ 206(d), 213(f), which addresses discrimination based on sex, and other laws dealing with discrimination based on union activity (29 U.S.C. § 158(a)(3)) or safety complaints (29 U.S.C. § 660(c)), all of which reflect vital national policy concerns regarding employment, do not apply abroad. *See* n.2, *supra*. The EEOC's and its *amici*'s bald assertion, without legal or factual support, that Title VII is more analogous to antitrust, securities or copyright laws rather than employment laws, does not provide a valid basis to extend extraterritorial jurisdiction. *See* K. Kirschner, *The Extraterritorial Application of Title VII of the Civil Rights Act*, 34 Labor L.J. 394, 400-01 (1983) ("*Extraterritorial Application*").

B. Similar to Other Protective Labor Legislation, Title VII's Legislative History Does Not Support Extraterritorial Application.

Like other protective labor legislation, Congress has not specifically and clearly enunciated Title VII's application to foreign countries.[3] *EEOC v. Kloster Cruise Ltd.*, 743 F. Supp. 856, 858-59 (S.D. Fla. 1990). Congress' oblique reference to aliens in the alien exemption provision was to ensure that such legislation would apply, as the EEOC expressly stated in its initial regulations on this subject, to citizens and *non*-citizens, domiciled or residing in the United States. 29 C.F.R. § 1606.1(c) (1970). For Petitioners and their *amici* to

3 It is up to Congress, not the courts, to expand the jurisdiction of Title VII. When the courts unanimously rejected extraterritorial application of the Age Discrimination in Employment Act, 29 U.S.C. § 601 *et seq.* ("ADEA"), Congress amended such legislation and placed specific appropriate proscriptions on the ADEA's extended coverage. *See Lopez v. Pan Am World Services, Inc.*, 813 F.2d 1118, 1119 n.3 (11th Cir. 1987); *DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282, 1283 (5th Cir. 1986); 29 U.S.C. § 623(h). *See* Point III, *infra*. Unlike the ADEA, which only pertains to age discrimination, application of the panoply of rights in Title VII would cause great problems for employers abroad.

rely on this cryptic reference to aliens, which has its genesis in legislation originally proposed in 1949, stretches advocacy to the outer bounds of reason. Such words were probably inserted regarding aliens to ensure protection of aliens in the United States.[4] The protection of aliens within the United States, as this Court later held,[5] was needed due to the discriminatory application of many laws against aliens in the United States at the time.[6] Indeed, there is still a furor raging with respect to application of protective labor legislation to aliens within the United States.[7]

Most assuredly, if Congress had intended to apply such legislation abroad, Congressional leaders and supporters of Title VII, including representatives of Petitioners' *amici* herein, would have discussed its alleged global application in their testimony. In numerous hearings prior to the passage of Title VII, representatives of the Anti-Defamation League of B'nai B'rith ("ADL"), the American Jewish Congress ("AJC") and the National Association for the Advancement of Colored People ("NAACP") testified before Congress.[8]

4 The Brief of Respondents also points to the need for the alien exemption provision based on a concern of Congress to avoid problems and conflicts with the application of United States employment laws to aliens in U.S. possessions.

5 *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

6 *See, e.g., Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Oyama v. California*, 332 U.S. 633 (1948); *Extraterritorial Application, supra* at 400 n.26 (1983).

7 *Compare Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) and *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) *with Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwik*, 441 U.S. 68 (1979) and *Foley v. Connelie*, 435 U.S. 291 (1978).

8 *See, e.g., Civil Rights: Hearings on Miscellaneous Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963) (statement of Herman Edelsberg of the ADL; statement of Will Maslow of the AJC; statements of Roy Wilkins, Clarence Mitchell, Dr. Aaron E. Henry and Rev. Walter Fauntroy of the

The hearings on Title VII contain no statements urging or suggesting extraterritorial application. Instead, the content of the speeches focused on domestic concerns and the eradication of discrimination in this country. *Federal Fair Employment Practice Act: Hearings on H.R. 4453, Before a Special House Subcomm. on Education and Labor*, 81st Cong., 1st Sess. (1949). The statements emphasized throughout that individuals in America should be treated with equal rights.[9]

POINT II

NO DEFERENCE SHOULD BE ACCORDED TO THE EEOC'S INTERPRETATION OF TITLE VII'S ALLEGED EXTRATERRITORIAL COVERAGE

Each federal agency[10] responsible for enforcing protective labor legislation correctly believes its job is of paramount importance. However, an agency's belief that its laws should apply abroad, as has been erroneously asserted at different times by the National Labor Relations Board, the National Mediation Board, the Department of Labor, etc., should not be given credence over the express language of enabling legislation of such agencies or in the absence of any such support in the legislative history thereof.

Ample authority supports the proposition that an administrative agency's interpretation of its extraterritorial jurisdiction may not be entitled to any deference. *CFTC v. Nahas*, 738 F.2d 487, 493 & n.13, 495 & n.17 (D.C. Cir. 1984); *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1323 & n.130 (D.C. Cir. 1980). The deference argument should not be indulged whenever an agency purports to determine the scope of its own jurisdiction. *Cleary v. United States Lines, Inc.*, 728 F.2d 607, 610 n.6 (3d Cir. 1984); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983), *cert. denied*, 471 U.S. 1069 (1985); *Western Coal Traffic League v. United States*, 694 F.2d 378, 383-84 (5th Cir. 1982), *cert. denied*, 466 U.S. 953 (1984).

The EEOC has often sought to expand the coverage of Title VII beyond its intended boundaries, only to have its interpretation of the Act rebuked by the federal courts. *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 69 n.6 (1986); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976). For example, in *Espinoza*, *supra*, this Court held that the EEOC's broad interpretation of Title VII to prohibit discrimination on the basis of citizenship was incorrect. In *Espinoza*, the EEOC argued as *amicus curiae* that its interpretation of the Act was entitled to great deference. While acknowledging that EEOC guidelines are entitled to deference, this Court held:

> [D]eference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question. Courts need not defer to an admin-

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NAACP); *Equal Employment Opportunity: Hearings on H.R. 405 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. (1963) (statement of Murray Gordon of the AJC; statements of Herbert Hill and Rev. Richard Allen Hildebrand of the NAACP); *Hearings on H.R. 4453, infra* (statement of Herman Edelsberg of the ADL; statement of Will Maslow of the AJC; statement of Clarence Mitchell of the NAACP).

9 Civil Rights; *Hearings on Miscellaneous Proposals*, *supra* at n.8.

10 The State Department which is responsible for foreign affairs has not joined the EEOC and the Department of Justice in this case, unlike the recent case of *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1138 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989), dealing with foreign employers doing business in the United States.

On October 24, 1989, in a panel session sponsored by the American Bar Association, the Federal Bar Association and the District of Columbia Bar, a Legal Advisor for the State Department disagreed with the EEOC's extraterritorial interpretation relating to employment discrimination:

> The general counsel of the Equal Employment Opportunity Commission [Charles A. Shanor] and a legal adviser for the Department of State [Ted A. Borek] were unable even to agree on the . . . application of fair employment laws to transnational corporations in the United States and abroad.

Daily Labor Report, No. 206 at A-3 (BNA) (Oct. 26, 1989).

istrative construction of a statute where there are "compelling indications that it is wrong."

414 U.S. at 94-95 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)).

There are several infirmities in the EEOC's argument that its extraterritorial interpretation is entitled to deference. First, neither the EEOC nor the Department of Justice has any special expertise in the area of foreign employment or affairs. This is not a question of whether certain conduct amounts to a prohibited form of employment discrimination but, instead, a matter of statutory interpretation as to whether an act of Congress can be applied outside the United States in the absence of any clear indication of such foreign coverage.

Second, the position now taken by the EEOC "contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." *General Electric*, 429 U.S. at 142. Thus, until 1980, the EEOC provided that Title VII protects all individuals, both citizens and noncitizens, *domiciled or residing in the United States*, against discrimination. . . ." 29 C.F.R. § 1606.1(c) (1970) (emphasis added). Indeed, the EEOC's pre-1980 regulations regarding the alien exemption provision seemed to comport with the *Espinoza* Court's interpretation which cited such regulations approvingly. *Espinoza*, 414 U.S. at 95 n.8; *Extraterritorial Application*, *supra*, 399 & n.24. However, in 1980, the EEOC revised its regulations and eliminated this provision without explanation. *See* 29 C.F.R. § 1606.2 (1980). Hence, the EEOC's position has been inconsistent and contradictory.

Finally, the lack of any specific Congressional grant of authority for extraterritoriality also cuts against deferral to the EEOC. The very fact that the EEOC must rely on a negative inference or an implication to be discerned from the alien exemption in Section 702 shows the lack of explicitness required to find that a United States labor law should apply extraterritorially. The EEOC's position rests ultimately on the proposition that the Congress acts by silence and obfuscation. *See McCulloch*, *Benz* and *Foley*, *supra*. Moreover, Congress itself has not indicated in any way that Title VII applies to Americans working abroad. *See Zahourek v. Arthur Young & Co.*, 567 F. Supp. 1453, 1455-56 (D. Colo. 1983), *aff'd*, 750 F.2d 827 (10th Cir. 1984); *U.S. Law Affecting Americans Living and Working Abroad, A Report to the Committee on Foreign Relations, United States Senate*, August 1980, Government Document No. Y4.F76/2:Am3/5.

Accordingly, this Court should not defer to the EEOC's position on its own jurisdiction and instead should decline to apply Title VII extraterritorially.

POINT III

CONGRESSIONAL ACTION SUBSEQUENT TO THE PASSAGE OF TITLE VII SHOWS THAT CONGRESS DID NOT PROVIDE FOR TITLE VII'S EXTRATERRITORIAL APPLICATION

Congress' rare forays into the field of labor relations affecting foreign countries have always been done deliberately, through the use of specific and express language. In the Export Administration Act of 1979, 50 U.S.C. App. §§ 2401-2420 (1982 & Supp. III 1985) ("EAA"), Congress demonstrated that it knows how to apply United States' laws extraterritorially when it so chooses. Unlike the oblique alien exemption language in Section 702 of Title VII relied on by Boureslan and the EEOC, the EAA's extraterritorial reach is clearly stated. The term "United States person" is defined to include "any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern . . . ." 50 U.S.C. App. § 2415(2) (1982). The EAA then provides that:

> [T]he President shall issue regulations prohibiting any *United States person*, with respect to his activities in the interstate or foreign commerce of the United States,

> from taking . . . any of the following actions with intent to comply with . . . any boycott fostered or *imposed by a foreign country* against a country which is friendly to the United States . . . :
>
> • • •
>
> (B) Refusing . . . to employ or otherwise *discriminating against any United States person on the basis of race, religion, sex or national origin of that person*. . . .

50 U.S.C. App. § 2407(a)(1) (1982) (emphasis supplied).

The above provisions prohibit an American corporation, or its foreign affiliates, from discriminating against United States citizens in their employment overseas on the basis of race, religion, sex or national origin pursuant to a boycott ordered by a foreign country. Congress obviously did not view Title VII as having extraterritorial coverage when it promulgated the EAA in 1979 because the EAA's discrimination provisions would then be merely redundant to the discrimination provisions set forth in Title VII.

If Congress viewed Title VII as having extraterritorial reach, which is not indicated in its legislative history, then the EAA's prohibition of employment discrimination by American corporations against American citizens need never have been drafted. Indeed, the EAA evidences Congress' recognition that Title VII does not apply overseas and provides a vivid example of how Congress uses express language to overcome the presumption against extraterritorial coverage.

In the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5116 (Supp. V 1987), Congress required that "[a]ny *national of the United States* that employs more than 25 persons *in South Africa* shall take the necessary steps to insure that the Code of Conduct is implemented. . . ." 22 U.S.C. § 5034 (emphasis supplied). The term "national of the United States" is defined to include any corporation incorporated in the United States. 22 U.S.C. § 5001(5). Like the EAA, this statute provides another example of how Congress explicitly sets forth its intention to apply United States' laws extraterritorially, and how Congress does not resort to negative inferences for this purpose.

The types of discrimination prohibited by the Code of Conduct are limited to race and ethnic origin. 22 U.S.C. § 5035(a)(2). Congress did not include religion and sex in drafting this statute specifically dealing with employment in a foreign nation. Even with respect to the common prohibitions against race and ethnic discrimination, if Title VII applied overseas, it would cover an employer in South Africa with fifteen or more employees while the Comprehensive Anti-Apartheid Act applies to employers with more than twenty-five employees. This variance in coverage over allegedly identical prohibitions is puzzling if one accepts the theory that Title VII applies overseas. More importantly, if Congress had originally intended Title VII to apply extraterritorially, it is inexplicable why it would subsequently draft a redundant equal employment opportunity provision that was already encompassed by Title VII.

The explicit language in the EAA and the Anti-Apartheid Act, as well as the amended ADEA, indicating Congress' intent to apply such laws abroad, is consistent with the cautious approach the United States Congress has taken in addressing issues impacting on United States corporations doing business abroad. It also contrasts markedly with the EEOC's newfound willingness (after many years of taking a different position) to traipse into foreign countries and administratively dictate American employment policies on the strength of only a negative inference. Indeed, as the *en banc* majority stated below regarding the EAA and the Anti-Apartheid Act:

> Congress demonstrated in the above acts its awareness of the need to make a clear statement of extraterritorial application, address the concerns of conflicting foreign law, and provide the usual nuts-and-bolts provisions for enforcing those rights.

Boureslan, *supra*, 892 F.2d at 1274.

POINT IV

THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF UNITED STATES PROTECTIVE LABOR LAWS IS BASED ON FIRM POLICY GROUNDS

A. Practical Considerations of Title VII in a Foreign Context Preclude Extraterritorial Application

In advancing policy arguments for applying Title VII abroad, the EEOC and the *amici* supporting Boureslan conveniently ignore the policy considerations which are embodied in the presumption itself. As summed up by the initial Fifth Circuit majority in this case:

> [W]e cannot ignore strong countervailing policy arguments against the application of Title VII abroad. The religious and social customs practiced in many countries are wholly at odds with those of this country. Requiring American employers to comply with Title VII in such a country could well leave American corporations the difficult choice of either refusing to employ United States citizens in the country or discontinuing business.

857 F.2d at 1020. Will U.S. and foreign employers in foreign countries, which would be swept into the ambit of the EEOC's interpretation, now be required to include Americans abroad in affirmative action plans based upon worldwide employment, be required to file EEO-1 forms and reports, and be subject to EEOC inspection, recordkeeping and notice posting requirements in foreign work places? These issues were never addressed by Congress in either Title VII or its legislative history, not because of an oversight by Congress, but because foreign application of Title VII was never intended.

Under the EEOC's theory, if Title VII applies abroad, so would the statutory provisions of the Americans with Disabilities Act of 1990, 29 U.S.C. § 12101, *et seq.* ("ADA"). Thus, United States and foreign employers abroad would have to reconstruct their facilities to ensure accessibility,

accommodate handicapped persons abroad, make qualified interpreters and readers available, and so forth because the remedial section of the ADA incorporates Title VII's enforcement mechanism. 42 U.S.C. § 12117. To further show Congress could not have intended Title VII to apply abroad, the remedial measures currently taken by the EEOC within the United States with respect to English-only rules, prohibitions on speaking foreign languages, requiring fluency and proper accents, would pose great problems in foreign countries. *See, e.g., Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *vacated*, 109 S. Ct. 1736 (1989); *Saucido v. Brothers Well Service*, 464 F. Supp. 919 (S.D. Tex. 1979).

The workforce at a foreign worksite of a U.S. corporation will usually be multinational. The greatest percentage of the employees, as in the case of Aramco, will often be from the host country. Thus, the legal fiction of assigning U.S. nationality to a corporation does not change the underlying fact that persons who act on behalf of the corporation, *i.e.*, its managers, supervisors and employees, are often not U.S. citizens. Consequently, the persons allegedly engaging in discriminatory conduct such as creating a hostile work environment,[11] denying promotions on the basis of national origin, terminating employees on the basis of race or assigning work on the basis of sex will be foreign nationals or citizens of other nations.[12] Therefore, although a plaintiff in such actions may be a U.S. citizen, application of Title VII to U.S. or foreign corporations abroad would inevitably result in the regulation of foreign nationals which would be a

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11 Applying Title VII abroad to allegations of sexual harassment may be extremely difficult. The social mores of certain Latin American and European cultures may permit as perfectly acceptable words or conduct that may be offensive here in the United States and proscribed by the EEOC's rules on sexual harassment. In Saudi Arabia, women are not even permitted to work with men based on the Saudi's interpretation of the Koran. Labor and Workmen Law of Saudi Arabia, Article 160.

12 In this particular case, the supervisor complained of by Boureslan was a citizen of Great Britain.

source of international discord. These same foreign nationals, while they would be subject to Title VII's prohibitions in conducting themselves towards U.S. citizens, would not enjoy the benefits of Title VII.

Without any empirical or other support, Petitioners attempt to paint an ominous picture of the future for Americans employed abroad in the event Title VII is not applied extraterritorially. They speculate that minorities and women will decline overseas assignments to avoid being subject to discrimination, will lose opportunities for advancement if they decline such assignments and will be terminated if they accept such assignments. They further surmise that employers will in turn hire only white Anglo-Saxons to work abroad, will launder their discrimination and will send persons overseas in an effort to avoid compliance with fair employment laws. Contrary to the hypotheticals posed by Petitioners, the courts have already addressed the issue of discriminatory conduct in the United States having potential effect on foreign employment. Such conduct has already been held to be a violation of Title VII and would not be affected by the outcome of this case. *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981). Moreover, Petitioners ignore the numerous discrimination laws of other countries, adapted to the circumstances of each country, which would protect against any discrimination abroad.

Any U.S. corporation doing business in a foreign country will be subject to the host country's laws by virtue of having availed itself of the benefits of doing business in that country. Indeed, it is not the prospect of regulation that SHRM and its members fear, but the prospect of dual and, inevitably, inconsistent and conflicting regulation.

B. Congress Did Not Apply Title VII to Many Americans in the United States Let Alone to those Abroad

Title VII has never applied to all American citizens employed by American companies even in the United States.

Indeed, according to the EEOC's own statistics, Title VII *does not apply* to *over 85 percent* of all domestic business establishments or to about *15 percent* of the workforce employed in this country amounting to the exclusion from Title VII of more than ten million working Americans within the territorial borders of the United States. T. Eisenberg & S. Schwab, *The Facts Clearly Show that Reversal of Anti-Bias Precedent Would Create Hardship*, Manhattan Lawyer, Feb. 28–Mar. 6, 1989, at 16.[13]

Indeed, under the terms of the statute itself, Title VII does not protect numerous Americans and aliens working in the United States. *See, e.g.*, 42 U.S.C. § 2000e(b) (employers with fewer than 15 employees not subject to Title VII); 42 U.S.C. § 2000e(f) (elected public officials and their personal staff, immediate advisers and policy-making appointees not protected by Title VII); 42 U.S.C. § 2000e-1 (employees of a religious society or religious educational institution alleging religious discrimination not protected by Title VII); 42 U.S.C. § 2000e-2(i) (employees of business on or near an Indian reservation alleging preferential treatment of Indians not protected by Title VII).

In addition to these statutory exceptions, case law has established further situations to which Title VII is not applicable. *See, e.g., Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (religious organizations exempted from aspects of Title VII); *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir. 1986) (independent contractor not protected by Title VII); *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd mem.*, 580 F.2d 1054 (9th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979) (same); *Smith*

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13 Apparently, the EEOC is seeking to expand its jurisdiction and coverage on all fronts. The EEOC was recently rebuffed in its attempt to apply the ADEA to Indian tribes. The Tenth Circuit held that the ADEA, like Title VII, should not apply to the Cherokee Nation. *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989).

v. Berks Community Television, 657 F. Supp. 794 (E.D. Pa. 1987) (volunteer workers are not employees under Title VII).

Since Title VII does not even apply to many Americans in the United States, it would be ludicrous to assume that Congress intended it to apply to all American citizens working in foreign countries. Moreover, contrary to the assertion of Petitioners' *amici*, if Title VII does not apply to all persons within the United States, why would anyone working overseas believe that such law would apply to them, especially when almost all other protective labor legislation does not? *See* Point I, *supra*.

C. The United States Government Itself Recognizes the Differences in Employment Practices Abroad

The practical and political pitfalls of applying Title VII extraterritorially are well-exemplified by the instant case. Saudi Arabia is an Islamic country. The Koran, or Moslem holy book, serves as the state's guiding document and the customs and practices of Islam are protected by the legal system of Saudi Arabia. In Saudi Arabia, the Labor and Workmen Law of 1969 ("Labor Law") regulates all employment within its borders, including that of foreign companies and foreign employees.

Obvious conflicts exist between Title VII and Saudi Arabian law. Thus, the law requires Saudi Arabs to be favored over all others (Article 45 of the Labor Law) and, consistent with Islamic Law, prohibits women from commingling in the workplace with men (Article 160 of the Labor Law). Additionally, Islam is the official state religion and guiding force of the Kingdom.[14]

The limits placed on women in Saudi society highlight the magnitude of the conflict that would ensue if employers applied Title VII in Saudi Arabia. Legally, Saudi women cannot do anything alone that might allow them to somehow encounter a man on their own to whom they were not

14 *See Saudi Religious Police Turn More Aggressive*, Washington Post, Dec. 13, 1990, at A43, col. 1.

related, including leaving home, travelling, eating, or staying in a hotel.[15] Women are also prohibited from driving. "In public, Saudi women are required to wear a black robe covering almost all their body and usually a veil to cover their hair and face as well." *Saudi Women*, New York Times, Dec. 8, 1990, at 8, col. 3. Yet, if U.S. employers were to apply even some of these limitations to U.S. women working abroad, they would conflict with the mandates of Title VII if the statute is found to apply overseas.

In recognition of these cultural differences between the United States and its host in the Persian Gulf, the U.S. Department of Defense has implemented policy guidelines for American military personnel in Saudi Arabia. In a booklet entitled *A Soldier's Guide to Saudi Arabia*, published by the United States Army,[16] the government states: "As in other nations, foreigners must comply with the laws of Saudi Arabia while staying there" whether or not they conflict with American Laws. Guide at 27. The Guide further states: "As guests within a host country, you should avoid subjects or situations which are sensitive to Saudis and other Arabs," listing a dozen such sensitive areas. Guide at 29. The Army then provides a list of "Do's" and "Don'ts" for its personnel in Saudi Arabia under such headings as "working with Arabs," "religion," "women," "foreigners and the law," and "sensitivities." In deference to the Islamic religion, military personnel are not to "[d]isplay a crucifix or star of David in public, even as jewelry." Guide at 19. As reported in the press, U.S. chaplains and rabbis are not permitted to wear crosses or stars of David while in Saudi Arabia, all non-Muslim religious services are to be conducted secretly, religious items often are removed from packages sent to U.S.

15 *See Some Saudi Women Push Changes*, New York Times, Dec. 8, 1990, at 8, col. 3 ("*Saudi Women*"); *Saudi Interior Minister Prohibits All Protests for Change by Women*, New York Times, Nov. 18, 1990, at 16, col. 3; *Americans Rushing to Learn Saudi Culture*, Washington Post, Dec. 13, 1990, at A48, col. 1.

16 HQDA, Office of the Chief of Public Affairs, Command Information Division, *A Soldier's Guide to Saudi Arabia* (1990).

service personnel, and in the event U.S. troops are in Saudi Arabia over Christmas and Hanukah any celebrations are to be severely curtailed.[17]

The Army has advised women military personnel to "dress in a manner acceptable to Arabs." Guide at 23. While uniforms are always acceptable, "for civilian attire Western clothing is OK if it fits loosely and covers the neck, arms and legs. . . . Don't wear pants in public unless they're part of your authorized uniform . . . [and don't] wear tight or revealing clothing in public, considered immodest and undignified in Arab culture." *Id.* Women are also advised to "[e]xpect to ride in the back of public buses" and "to be excluded from some stores." *Id.* They are also told not to "[k]iss, touch or show affection toward any man, including a non-Saudi man, in public" and that "[d]ancing in public and mixed swimming/bathing are forbidden . . . ." *Id.* at 22-23.[18] According to General Colin Powell, United States women are being requested to "respect the customs and traditions of the country in which we are guests."[19]

It is quite appropriate for the U.S. government to impose such restrictions on its own civilian and military personnel in Saudi Arabia out of a concern for the religious and other practices and sensitivities of their foreign host. It is inconsis-

17 *See* Washington Times, Nov. 22, 1990, at A1; New York Times, Nov. 21, 1990, at 10, col. 3; Washington Times, Sept. 14, 1990, at A10. The seizure of religious items was confirmed by General Colin Powell, Chairman of the Joint Chiefs of Staff, in testimony before the Senate Armed Services Committee on Sept. 11, 1990. Reported in Legi-Slate Report, Nov. 30, 1990 at 27, 41, 46-47. *See also Observing Hanukah in Saudi Arabia: An American's Test of Faith*, Washington Post, Dec. 13, 1990, at A43, col. 1.

18 U.S. servicewomen are required to cover their arms and legs at all times, and "have been told to avoid wearing shorts, uncovering their arms, driving vehicles, walking unescorted, chatting casually in public with men who are not their husbands or stripping down to their T-shirts, as their male counterparts do." *An Extra Enemy for Women Soldiers*, Chicago Tribune, Sept. 2, 1990, at C3. *See also* Boston Globe, Nov. 13, 1990, at 12; Chicago Tribune, Aug. 27, 1990, at C3.

19 Testimony of General Colin Powell, *supra*, at n.17.

tent, however, for the same government to seek to impose different standards and values on U.S. private employers of U.S. citizens in foreign workplaces without the same solicitude to the same host. It is obvious that Congress never considered any of these matters when it passed Title VII in 1964.

Of particular interest in this regard are the regulations of the Office of Federal Contract Compliance Programs ("OFCCP"), the agency within the U.S. Department of Labor charged with administering Executive Order 11246. Executive Order 11246 creates the nondiscrimination and affirmative action requirements for all Federal contractors. The parallel responsibilities and obligations of Title VII and Executive Order 11246 have long been recognized by the courts. *See, e.g., Weber v. Kaiser Aluminum & Chemical Co.*, 563 F.2d 216 (5th Cir. 1977), *rev'd on other grounds*, 443 U.S. 193 (1979). The regulations of the OFCCP explicitly exempt from coverage work performed outside the United States. 41 C.F.R. § 60-1.5(a)(3). It is an anomalous position for one part of the government's nondiscrimination enforcement mechanism to claim extraterritorial reach without statutory support while its sister agency, created by Executive Order, and thus expressly representing the intent of the Executive Branch, disclaims such reach.

D. Principles of Foreign Sovereignty and Comity Dictate That Title VII Not Be Applied Extraterritorially

Since its inception, the United States has favored the free international movement of private capital, encouraging the investment of foreign capital in this country and encouraging United States corporations to invest their capital abroad. H. Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229 (1956). The United States has effectuated this policy through the bilateral treaty of friendship, commerce, and navigation ("FCN treaty")[20] which "provide extensively for the rights of each country's citizens, their property and

20 FCN treaties are Article II treaties in that they are ratified by the Senate pursuant to Article II of the Constitution.

other interests, in the territories of the others, and for the rules mutually to govern their trade and shipping." *Id.* at 230.

The purpose of the FCN treaties is to ensure equality of treatment, known as national treatment, to foreign businesses and their employees in a foreign country. The treaties allow Americans to work overseas subject only to the limitations imposed by the host country on its own citizens.

The EEOC's position in this litigation runs contrary to the FCN treaties and the notion of national treatment by unilaterally giving American citizens further noncontingent rights not accorded to the host country's citizens. American companies doing business abroad would be required to comply with the inconsistent provisions of the laws of the host country and with Title VII. As such, they would be disadvantaged compared to their foreign counterparts because the latter would only have to comply with the laws of the host country.

By contrast, foreign corporations doing business in the United States must comply with Title VII but need not adhere to their own countries' employment laws here. Indeed, if certain foreign countries such as South Africa sought to apply their laws to companies in the United States, it would surely run afoul of American laws. Likewise, American companies abroad should only be legally required to adhere to the host country's rules without the dual obligation of compliance with United States protective labor legislation abroad.

The international employment arena was explored by this Court in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), which held that a commercial treaty between the United States and Japan did not insulate an American subsidiary of a Japanese company doing business here from the prohibitions of Title VII. Plaintiffs alleged sex and national origin discrimination in the company's hiring of its employees in the United States. This Court held that foreign enterprises that engage in business in the United States are subject to the provisions of Title VII.

Based upon the same reasoning in *Sumitomo*, foreign nations apply their employment laws with equal force to American corporations or foreign subsidiaries doing business abroad. Such American companies, like foreign corporations in the United States, must comply with the employment laws governing all employees, both U.S. citizens and aliens, within the host country's borders, as well as the customs or practices which are protected or given effect by the foreign legal system. Foreign countries impose restrictions against discrimination,[21] promulgate laws requiring or permitting favoritism to certain groups,[22] and establish laws setting up tribunals to resolve these matters,[23] all of which may be different from Title VII. Accordingly, applying employment laws extraterritorially often creates irreconcilable conflicts because a foreign based employer would be required to comply not only with the laws of its host nation, but also with different American

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21 *See, e.g.*, Code du Travail [C. Trav.], arts. L. 122-35, 122-45, 123-1 (French laws prohibiting employment discrimination on the basis of sex, marital status, national origin, religion or handicap); Sex Discrimination Act, 23 Eliz. 2, ch. 65 (1975), Race Relations Act, 24 Eliz. 2, ch. 74 (1976), (English laws prohibiting sex, race or national origin discrimination); Unfair Dismissals Act, § 6 (1977), Employment Equality Act (1977) (Irish laws prohibiting employment discrimination on basis of religious or political beliefs, race, pregnancy, sex and marital status); Canada Labour Code, § 5 (1970) (prohibition against race, national origin and religious discrimination).

22 *See, e.g.*, Labor and Workmen Law of 1969 of the Kingdom of Saudi Arabia, arts. 44, 45, 49 and 50 (Saudi Arabia) (Saudi Arabian laws requiring 75% of workforce to be nationals and giving hiring preference to nationals); Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 Stan. L. Rev. 947, 953 n.33 (1979) (American treaties with Nicaragua and France, in deference to laws of those countries, limit hiring of foreign employees). *See generally* R. Blanpain & F. Millard, *Comparative Labour Law and Industrial Relations* 339-340 (BNA) (1982).

23 *See, e.g.*, Labor and Workmen Law of 1969 of the Kingdom of Saudi Arabia, arts. 172-178 (Saudi Labor Tribunals); C. Trav. art. 511-1 (French Labor Tribunal); Unfair Dismissals Act, § 1 (1977) (Irish Employment Appeals Tribunal); Industrial Training Act, 12 Eliz. 2, § 12 (1964) (English Industrial Tribunals).

laws, even though the employees in question work solely within the host nation.

Examples of these conflicts include laws and practices favoring those of particular religions or non-religions (such as the favoring of Catholics or Moslems in countries predominately of that religion or of atheists in communist countries), favoring men over women (as in Japan or some South American countries), favoring certain racial or ethnic groups (as Japanese in Japan) or discriminating against persons of certain national origins (as Greeks in Turkey and Turks in Greece). Although favoritism laws and practices contravene American morals and values and conflict with Title VII, an American employer abroad would have to comply with such laws and customs just as foreign companies in America must comply with Title VII. As the court held in *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1277 (9th Cir. 1981), "the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system," just as "[n]o foreign nation can compel the non-enforcement of Title VII here." (Footnote omitted).

SHRM's position is predicated on the practical and legal problems which would be created by the adoption of Boureslan's and the EEOC's position. While the application of our own democratic and humane notions of workplace equity is a desirable development in the United States, and one to which our government devotes considerable energy, the position advanced by Boureslan and the EEOC is quite different. They ask this Court to endorse the internationalization of our domestic labor laws. Such a development runs counter to the historical practices of the United States.

For example, of the 149 ratified conventions of the International Labor Organization ("ILO"), the United States has ratified only ten. While the conventions merely commit ratifying countries to pass domestic implementing legislation, Congress has historically refused to subject domestic labor legislation to international oversight. In particular, Convention 111, Discrimination (Employment and Occupation),

adopted by the ILO in 1958, has not been ratified by the United States even though our domestic legislation, including Title VII, exceeds the standards set by that convention. It thus defies logic and historical experience to believe that the Congress intended by silence and indirection to internationalize the reach of Title VII.

Accordingly, important policy concerns dictate that Title VII should not be applied extraterritorially.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* Society for Human Resources Management respectfully urges this Court to affirm the decision below.

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